

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARGUERITE McGEE

Claimant

VS.

YELLOW TECHNOLOGY SERVICES, INC.

Respondent

Self-Insured

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Docket No. 201,419

ORDER

The application of respondent for review by the Workers Compensation Appeals Board of the Award of Administrative Law Judge Robert H. Foerschler dated October 27, 1997, came on for consideration.

APPEARANCES

Claimant appeared by and through her attorney, Frank D. Eppright of Kansas City, Missouri. Respondent, a self-insured, appeared by and through its attorney, Michael T. Halloran of Kansas City, Missouri. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For purposes of this award, the parties have stipulated that claimant had a functional impairment of 12.5 percent to the body as a whole. In addition, the parties acknowledged claimant's average weekly wage was \$912.02 per week on the date of accident and at the time of the regular hearing she was earning \$17,300 per year as a secretary for a Kansas City, Missouri, school district. The job she was performing for the school district appeared to be within the restrictions placed upon her by the various doctors in this matter, with

claimant spending most of her time answering the telephone and only 5 percent of the time picking up mail and doing light typing.

Claimant had been employed by respondent for nearly 16 years when she began developing problems in her upper extremities. Her job generally involved data entry and, at times, she would act as a lead operator, new employee trainer, and backup lead/controller. These jobs involved various degrees of manual labor, lifting, and typing. The only issue to be considered by the Appeals Board is that of work disability and specifically under K.S.A. 44-510e(a), "[t]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident"

The Appeals Board acknowledges that it must also consider the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. However, the finding by the Administrative Law Judge, which compared claimant's current \$17,300 per year salary with her \$912.02 average weekly wage, of a 63.5 percent wage loss is supported by the credible evidence and is adopted for the purposes of this award.

The Appeals Board reviewed the reports and testimony of Dr. James P. Hopkins and Dr. Vito J. Carabetta, both of whom provided opinions regarding claimant's task loss for the preceding 15 years.

Both Dr. Carabetta and Dr. Hopkins were provided an identical list of 13 tasks from the various jobs claimant performed for respondent. As respondent was the only employer that claimant worked for during the 15 years preceding the date of accident, no other employment situation need be considered.

Dr. Hopkins, when provided the list of 13 tasks which claimant performed while employed with respondent, found that claimant was incapable of performing 15 out of 15 preexisting tasks and, therefore, claimant had lost the ability to perform 100 percent of the tasks she performed before the accident. However, the Appeals Board has significant concern with Dr. Hopkins' opinion. First, the task performing list contains three jobs and 13 separate tasks associated with those jobs. Dr. Hopkins managed to use 15 tasks rather than the 13 contained in Hopkins Exhibit 3. In addition, when questioned about the task list, Dr. Hopkins was asked only to identify the task list and his opinion sheet which were marked as Hopkins Exhibit 3.

Dr. Hopkins provided no testimony regarding specific tasks nor did he provide any opinion regarding the claimant's physical abilities or inabilities with regard to those tasks. Other than the simple work disability worksheet showing 15 tasks and 15 tasks eliminated there was no opinion expressed by Dr. Hopkins with regard to claimant's task performing abilities.

In addition, the Administrative Law Judge noted that in every single task description the following language was used: constantly using her hands in a gripping, pinching and grasping motion, and constant reaching, handling, fingering and feeling.

In certain instances, such as data entry or programming, this description would be appropriate. However, in tasks such as lead operator, training new employees, answering telephones, and moving boxes of bills and invoices, this task description would not be appropriate. The Administrative Law Judge found Dr. Hopkins' opinion to lack credibility. The Appeals Board agrees.

The task list provided both doctors discusses three separate jobs but several tasks are duplicative. In Carabetta Exhibit 3, three separate jobs are described: data entry operator, lead operator, and backup lead/control clerk. In considering the various tasks described in each of these jobs, the Appeals Board can find eight individual tasks including data entry, transmitted complete detail, trained new employees, logged in work, sorted through boxes, moved boxes of bills and invoices, answered phones, and programming. Of these eight, two tasks, those being moved boxes of bills and invoices and transmitted completed detail, required lifting up to 50 pounds which Dr. Carabetta felt was outside of claimant's physical abilities.

When questioned regarding the data entry and programming jobs which required keyboard activities, the doctor felt that claimant was physically capable of performing these activities. He did indicate claimant would feel some pain but would suffer no permanent worsening of her condition while performing these tasks. In adopting the opinion of Dr. Carabetta, the Appeals Board finds claimant has suffered a 25 percent loss of task performing abilities.

The Administrative Law Judge considered and adopted the opinion of claimant who described six separate tasks, two of which she felt she could no longer perform. However, K.S.A. 44-510e(a) requires the task performing opinion to be "in the opinion of the physician." Therefore, the Appeals Board cannot accept the opinion of claimant with regard to the tasks she performed or her ability or inability to perform those tasks. The statute clearly requires the decision be based upon a physician's opinion and not the opinion of the claimant.

In considering the 25 percent loss of task performing ability and averaging it with the 63.5 percent loss of wages, the Appeals Board finds claimant has suffered a 44.25 percent permanent partial disability to the body as a whole as a result of the injury suffered while working for respondent.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it is not contrary to the orders expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated October 27, 1997, should be, and is hereby, modified and the claimant, Marguerite McGee, is granted an award against the respondent, Yellow Technology Services, Inc., a self-insured, for an accidental injury sustained on February 15, 1996, for a 44.25 percent permanent partial general body disability, and based upon an average weekly wage of \$912.02.

Claimant is entitled to 6.75 weeks temporary total disability compensation at the rate of \$326 per week in the amount of \$2,200.50, followed by 183.64 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$59,866.64, for a total award of \$62,067.14.

As of March 30, 1998, claimant is entitled to 6.75 weeks temporary total disability compensation at the rate of \$326 per week in the amount of \$2,200.50, followed by 103.68 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$33,799.68, for a total due and owing of \$36,000.18 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 79.96 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$26,066.96 until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the orders expressed herein.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Eppright, Kansas City, MO
Michael T. Halloran, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director